IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1175

HATZLACHH SUPPLY COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OPINION BELOW

The opinion of the Court of Claims (App. A, pp. 1a-8a, *infra*) is reported at 579 F.2d 617.

JURISDICTION

The opinion and judgment of the Court of Claims were entered on July 14, 1978. On September 29, 1978, the Court of Claims denied a timely petition for rehearing (App. B, p. 9a, *infra*). On December 8, 1978, Mr. Chief Justice Burger extended petitioner's time for filing a petition for a writ of certiorari to and including January 27, 1979 (App. C, p. 10a, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied contract of bailment when goods seized from an importer by the United States Customs Service are lost while in the temporary custody of the Customs Service.

STATUTORY PROVISIONS INVOLVED

The Tucker Act, 28 U.S.C. §1419 provides, in relevant part, as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Tort Claims Act provides in relevant part, 28 U.S.C. § 2680:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> * * *
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by an officer of customs or excise or any other law-enforcement officer.

STATEMENT

Petitioner imported camera supplies and other items from Germany. Upon arrival of some of these goods in New Jersey, a routine inspection showed a discrepancy between the merchandise description on the delivery application and the invoices for the goods. Taking action which the

court below described as "perhaps of questionable severity" (p. 2a, *infra*), the United States Customs Service thereupon seized the goods and declared them forfeited.

Petitioner followed the regulatory procedures to obtain relief from the seizure and forfeiture, informing Customs that it had no role in the preparation of the merchandise description on the application, which was handled by a broker. Customs agreed to return the merchandise upon payment of $40,000.

Petitioner complied with the demand made by Customs, but when the shipment was returned, merchandise valued at $165,220.50 was missing. Petitioner thereafter brought suit in the Court of Claims alleging, *inter alia*, a breach of an implied contract of bailment. The government moved for summary judgment, claiming that there was no implied contract. The Court of Claims granted the government's motion and dismissed the petition.

REASONS FOR GRANTING THE WRIT

1. The court below recognized that its decision conflicted with the decision of the Court of Appeals for the Second Circuit in *Alliance Assurance Co. v. United States*, 252 F.2d 529 (2d Cir. 1958), which is reproduced as Appendix D (pp. 11a-24a, *infra*) to this Petition. The government conceded unequivocally in the Court of Claims, in its response to the petition for rehearing, that the court's decision presented a square conflict. The opening sentences of the government's response to the petition for rehearing were:

> Defendant agrees with plaintiff's statement that this Court's decision "conflicts head on with the *Alliance* ruling of the Second Circuit." (P. Reh. Br. p. 1.) As defendant pointed out in its briefs, however, the *Alliance* decision was clearly erroneous.

This square conflict between the Court of Claims and the federal appellate court which has jurisdiction over the port of New York — the city which ranks first in the country as an import center[1] — presents a grave risk of unfair and inconsistent judgments on identical facts depending on the forum where the claim may be made. Whether an importer whose goods are lost while in the custody of Customs is able to recover against the United States should not depend on whether or not the importer can manage to bring his suit in a federal court in New York, Connecticut and Vermont.

2. The decision of the Second Circuit in the *Alliance Assurance Co.* case was correct, and the decision of the Court of Claims is wrong. In *Alliance*, goods were detained for inspection by Customs officials for determination whether they were of the value and quantity declared in the invoice. The goods passed inspection, but they disappeared before they could be returned to the importer, whose subrogee thereafter sued the United States for breach of an implied contract of bailment. The government asserted that no contract of bailment was created by Customs' control over the merchandise.

The Second Circuit determined, however, that an implied contract of bailment existed and that the district court had jurisdiction to find that the government had breached its contract and was liable for damages. Specifically, the court found that the process by which the goods were detained and held by Customs created a mutual understanding that the goods would be returned (p. 15a, *infra*):

> The obligation of the government . . . stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice . . . . It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed.

[1] *See*, U.S. Department of Commerce, Highlights of U.S. Export and Import Trade, pp. 128-129 (1978).

This holding accords with numerous cases in which contracts have been implied from the general practices or powers — under statute or regulation — of a government agency in a given situation. In *C.F. Harms Co. v. Erie R. Co.*, 167 F.2d 652 (2d Cir. 1948), for example, a charterer of a barge was ordered to deliver the barge and the equipment on it to the Army at a particular pier. While it was in the custody of the Army, the barge was damaged in a storm. Although there had been no express agreement as to the responsibility of the Army to maintain or protect the barge, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, found an implied contract of bailment upon which the government could be sued under the Tucker Act (167 F.2d at 564):

> [H]ere it seems to us that there was a bailment, view the evidence as one will. The Army's control was unconditional; it need ask no leave of the Railroad for anything it might do; it could move the scow whether and when it chose; discharge her, or hold her, as it pleased. This the officer in charge understood; the Railroad understood; and each knew that the other so understood; and we can find nothing lacking which is essential to a bailment.

See also, United States v. Dickinson, 331 U.S. 745 (1947); *Algonac Manufacturing Company v. United States*, 428 F.2d 1241 (Ct. Cl. 1970).

In this case, as in *Alliance*, petitioner relied upon the statutes and regulations governing Customs' handling of imported goods to demonstrate that an implied-in-fact contract of bailment existed.[2] The Court of Claims stated (p. 5a, *infra*):

[2] The sole difference between the procedures in *Alliance* and those here — a difference which the Court of Claims mentioned, but on which it did not base its decision — is that the merchandise in *Alliance*

> [T]he statutes cited by the plaintiff, along with the action of [Customs] in agreeing to return the goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh.

The court below indicated that its basic difference with the Second Circuit was on the legal question whether the Tort Claims Act bars suit in the circumstances of these cases. The relevant provision of the Tort Claims Act (28 U.S.C. 2680(c)) exempts the United States from suit for:

> [a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

The Second Circuit in *Alliance* correctly held that the exemption in the Tort Claims Act was designed only "to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods" in their possession (p. 18a, *infra*). It said that the provision was not intended to bar actions "based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities . . . ." *Ibid.*

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was simply "detained" for comparison of the merchandise and its invoices, while in this case, the merchandise was "seized" and "subject to forfeiture." *Compare* 19 U.S.C. §1499 and 19 U.S.C. §1592. Under the latter procedure, the importer may follow an administrative process to challenge the seizure and, if it prevails, the merchandise is to be "returned forthwith to the claimant." 28 U.S.C. §2465. If, as here, Customs finds that mitigating circumstances justify "remission" of the forfeiture, it may impose reasonable terms, in this case the payment of $40,000, and then return the goods. See 19 U.S.C. §1618.

This issue of statutory construction is what separates the Second Circuit from the Court of Claims in this case. The court below held that while it could "sympathize with the plaintiff for the loss of such a substantial amount of goods" (p. 7a, *infra*), it would not permit such a claim in the face of the exempting language of the Tort Claims Act. In so doing, it applied the Tort Claims Act to an action which depends not on tort, but on contract.

The court below erroneously based its holding upon *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), which held that a solider is limited to the statutorily provided damages in the Veterans' Benefits Act for injuries incurred while in the service and may not sue in tort to avoid the limitations of the Act. The court also relied upon *Jackson v. United States*, 573 F.2d 1189 (Ct. Cl. 1978), which held that no such suit could be brought for breach of contract. But these cases do not determine whether a contract action may be maintained when a contract could be implied from the conduct of the parties and Congress has enacted *no alternative statutory remedy*.[3]

Finally, the decision of the court below leads to a totally unjust result whereby government agents are permitted to assume exclusive custody over valuable property with no countervailing responsibility to account for that property. Congress surely was not intending to permit the Customs Service to deal so cavalierly with imported goods when it included this particular proviso in the Tort Claims Act. The

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[3]In fact, the Court of Claims in *Jackson* did not find that a soldier could not sue on an implied contract simply because he could not have sued under the Tort Claims Act. Rather, the Court in *Jackson* analyzed the relationship between the soldier and the government — reviewing the details of his recruitment — and determined that no contract other than his written contract with the Army existed. A similar analysis of these facts would result in a finding that there was an implied contract of bailment.

extraordinary result reached by the court below is contrary to the fundamental principles which underlie the constitutional guarantees of Due Process and Just Compensation contained in the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States Court of Claims

No. 120–76

Decided July 14, 1978

HATZLACHH SUPPLY COMPANY, INC. v. THE UNITED STATES

Mark Landesman, attorney of record, for plaintiff.
George M. Beasley, III, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.
Richard A. Corwin, attorney of record, for noticed third-party Sea-Land Service, Inc.

Before DAVIS, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

This action, involving plaintiff's claim that the Government breached an implied-in-fact contract which allegedly arose from the detention of certain merchandise by United States Customs Service personnel comes before the court on defendant's motion for summary judgment and plaintiff's opposition thereto. Because we essentially agree with the Government's argument concerning the clear congressional intent to retain sovereign immunity with regard to claims arising out of detentions of materials by customs inspectors, we hold that plaintiff's petition does not state a claim upon which relief can be granted and, accordingly, we grant defendant's motion.

Hatzlachh Supply Company (Hatzlachh or plaintiff) alleges that in 1970 it imported certain camera supplies and miscellaneous items from Germany which, upon arrival in port in New Jersey, were seized and declared forfeited by the United States Customs Service (USCS). Plaintiff followed statutory and regulatory procedures in seeking relief from the forfeiture. *See* 19 U.S.C. § 1618 (1970); 19 C.F.R. § 171.11-13 USCS, in October of 1970, agreed to return the forfeited materials upon payment of a $40,000 penalty. Hatzlachh complied with the terms prescribed by the USCS and paid the $40,000 into the Treasury of the United States. Upon the return of the seized material to plaintiff, it was noted that certain items were inexplicably missing. Hatzlachh brought suit in this court seeking to recover $165,220.50 (plus $2,000,000 for alleged loss of "face and good will . . .") which it alleges was the total value of the goods that were "pilfered" or "stolen" while the forefeited material was in the possession of the defendant.

Defendant now moves for summary judgment on grounds that plaintiff has failed to state a claim within the jurisdiction of this court. Plaintiff's petition set forth two separate causes of action. The first involved an alleged breach of a contract of bailment while the second alleged that the seizures were "capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored" by law and that they "constituted an unreasonable detainer of plaintiff's property and deprivation without due process."

We agree with the defendant that plaintiff's second cause of action is unsupportable. Plaintiff's own petition to the Regional Commissioner of Customs *admitted* that the merchandise description submitted to the USCS officials was "erroneous" and that the discrepancy between the merchandise description and the items actually landed were "obvious and apparent." Although plaintiff's petition goes on to question the propriety of the USCS's actions against the goods, such "obvious and apparent" deviations from prescribed USCS import procedures certainly would render the USCS's action non-arbitrary and non-capricious, although perhaps of questionable severity.

Even if we should determine that the defendant's actions were so arbitrary and capricious as to be outside the broad statutory and regulatory discretion and authority accorded the USCS, this portion of plaintiff's second cause of action would then sound in tort, and this court would be without jurisdiction. 28 U.S.C. § 1491 (Supp. V 1975); *Algonac Mfg. Co.* v. *United States*, 192 Ct.Cl. 649, 428 F.2d 1241 (1970).

The second portion of plaintiff's second cause of action is equally without merit. Defendant's declaring a forfeiture of goods under 19 U.S.C. § 1592 (1970) is hardly comparable to a "taking" for public use without just compensation, which would allow plaintiff to recover pursuant to the Fifth Amendment's ban on such taking. *See, e.g., Huerta* v. *United States*, 212 Ct.Cl. 473, 548 F.2d 343, *cert. denied*, — U.S. —, 98 S.Ct. 108 (1977). Again, plaintiff is faced with the situation where the forfeiture was either declared in accordance with statutory and regulatory guidelines, in which plaintiff *was* accorded the "due process of law" and there was no "taking," or else the action taken was outside statutory and regulatory authority, in which case this court is without jurisdiction because plaintiff's action sounds in tort.

Plaintiff's first cause of action, however, based on the Government's breach of an implied contract of bailment, presents a much more difficult and serious problem. Plaintiff contends that the USCS, in taking custody of the goods, made only a provisional seizure pending full disposition on the merits. Plaintiff further relies upon the language of 28 U.S.C. § 2465 (1970), which states:

> Upon the entry of judgment for the claimant in *any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant* . . . (emphasis supplied in plaintiff's brief)

for the proposition that the Government's allegedly provisional seizure created an implied contract of bailment between Hatzlachh and the United States. Plaintiff's logical conclusion is that, in failing properly to protect and return some of the material seized, defendant breached this implied contract of bailment.

Plaintiff's argument gains considerable support from the decision of the Second Circuit in *Alliance Assurance Company* v. *United States*, 252 F.2d 529 (2d Cir. 1958). In that case involving similar circumstances, the court, in a two-part holding, determined that an implied-in-fact contract did exist[1] between the USCS and the importer and that the importer had an alternate cause of action under the Federal Tort Claims Act. The Federal Tort Claims Act assumes significance in *Alliance*, as it does in the case at hand, for two reasons. One is the resemblance which the importer's claim of a breach of contract bears to a claim for a breach of duty in tort. The other reason is that such claims in tort are explicitly barred by 28 U.S.C. § 2680(c) (1970), which excepts from the coverage of the Tort Claims Act:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs . . . .

The *Alliance* court, interestingly, found that the § 2680(c) exclusion did not apply because the merchandise in question had disappeared and goods which had disappeared could not have been subject to "detention" within the meaning of the statute. Even more to the point, however, the court in *Alliance* reasoned that the Government had, by exerting its statutory authority over the goods, implied a promise to return the goods to the importer. Thus, the court determined that plaintiff in *Alliance* had causes of action under both the Tucker Act, 28 U.S.C. § 1491 (Supp. V 1975) and the Tort Claims Act.

The defendant argues that Alliance was *wrongly* decided and is, in any event, distinguishable from the case at hand. It contends that the *Alliance* court, in reversing its own district court, incorrectly utilized the "loose, umbrella concepts of bailment law" to broaden drastically the Tucker Act's limited waiver of sovereign immunity. The Government further points out for support this court's

[1] Since the claim in *Alliance* was for an amount less than $10,000, the Federal District Court had concurrent jurisdiction with the Court of Claims. 28 U.S.C. § 1346(a)(2) (1970).

"venerable precedent" in *Schmalz* v. *United States*, 4 Ct.Cl. 142 (1868), where we held that the general law requiring customs inspection did not imply a contract with the Government.[2] Finally, defendant cites the rationale of the district court judge in *Alliance* in arguing that no implied-in-fact contract could exist because there was no mutual assent.

Even if the *Alliance* decision were correct, continues the Government, that case was distinguishable from the one at hand. In *Alliance*, the court was faced with a situation where the goods which subsequently disappeared had merely been detained for inspection pursuant to 19 U.S.C. § 1499, while, in our present case, the goods had actually been seized subject to forfeiture pursuant to 19 U.S.C. § 1592 (1970), because a violation of the customs laws had already been found. The defendant concludes that, since goods seized subject to forfeiture (under § 1592) can be returned only after some judicial discretionary or administrative determination has been made, no implied-in-fact contract could possibly have arisen out of the seizure.

The Government's final contention centers on the important public policy involved in allowing customs officials to go about their work unimpeded by fear of "implied in fact" contract claims each time they must seize or detain some item and on the related theory that waivers of sovereign immunity must be strictly construed. We reach the same result as does the defendant, although for the somewhat different reasons stated below.

Initially, it must be noted that the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh. All other things being equal,

[2] Defendant also notes that *Alliance* stands alone in holding the § 2680(c) Tort Claims Act exclusion inapplicable under similar circumstances, citing *United States* v. *1500 Cases*, 249 F.2d 382 (7th Cir. 1957); *S. Schonfeld Co., Inc.* v. *S.S. Akra Tenaron*, 363 F.Supp. 1220 (D.S.C. 1973); *Bambulas* v. *United States*, 323 F.Supp. 1271 (D.S.D. 1971).

such a factual and legal combination might enable plaintiff to prevail.

However, we need not now decide this issue because, unfortunately for plaintiff, all other things in the present case are not equal. This court has previously held that there can exist no contract implied-in-fact unless there is an actual meeting of the minds and a mutual intent to be bound. *See, e.g., Somali Development Bank* v. *United States*, 205 Ct.Cl. 741, 751, 508 F.2d 817, 822 (1974). Plaintiff here would have us *imply* a promise, or intent to be bound, on the part of the Government similar to the promise implied by the Second Circuit in *Alliance:*

> It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in *United States* v. *Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and *United States* v. *Lynah*, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There are, however, two major obstacles to adopting the rationale of *Alliance*. The first is the obvious factual distinction between the Government's tortious (or non-tortious) seizure of land from the unquestioned, rightful owner [as in *Dickinson*] and the USCS' seizure subject to forfeiture of goods entering the country illegally [as in our present case]. In our view, finding an implied promise to pay in the former set of circumstances certainly would not necessitate finding a similar promise to pay (or return the goods) in the latter.

An even more significant obstacle, however, is encountered in Congress' specific and explicit rejection of any tort liability for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. 2680(c). With this strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim

obviously arose "in respect of . . . the detention of . . . goods or merchandise by [an] . . . officer of customs . . . ."

In a recent decision, this court refused to find an implied-in-fact contract in a situation where Congress had, according to the Supreme Court's interpretation of the Tort Claims Act in *Feres* v. *United States*, 340 U.S. 135 (1950), restricted a serviceman's recovery for injuries—even those tortiously inflicted—to certain statutorily prescribed procedural and substantive limitations. *Jackson* v. *United States*, 216 Ct. Cl.__, 573 F.2d 1189 (1978). In *Jackson* we cited the Supreme Court's recent decision in *Stencel Aero Eng'r Corp.* v. *United States*, 431 U.S. 666 (1977), which noted that allowing recovery on an implied-in-fact contract would be to "judicially admit at the back door that which has been legislatively turned away at the front door." 431 U.S. at 673. We concluded that "Since a soldier cannot circumvent the compensation system by suing in tort for additional money damages for injuries, there is no logical reason to allow him to circumvent the congressionally mandated limitations in a suit that he characterizes as one for breach of contract, which is the case here." *Jackson, supra*, 216 Ct. Cl. at __, 573 F.2d at 1199.

The exact rationale we employed in *Jackson* gains added strength in the case at hand. Here, Congress has *specifically precluded recovery* in claims arising from customs detentions, even where such claims arose from tortious actions by the Government. This being the fact, it would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank* v. *United States*, 205 Ct.Cl. 741, 508 F.2d 817 (1974). While we may sympathize with the plaintiff for the loss of such a substantial amount of goods, we cannot judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front.

But we do not consider the present decision as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, e.g. a promise, representation or statement that the goods would be guarded or carefully handled. It is conceivable to us that, in such circumstances, a claim might lie under the Tucker Act even though 28 U.S.C. § 2680(c) might still preclude recovery under the Tort Claims Act.

For the above-stated reasons, after reading all of the submissions in the light most favorable to the plaintiff for purposes of plaintiff's opposition to this motion for summary judgment, we hold that Hatzlachh has failed to state a claim based on an implied-in-fact contract[3] and has, therefore, failed to state a claim for which we can grant relief.

Accordingly, after consideration of all the submissions of the parties, and without oral argument, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

[3] Plaintiff's other contentions, as outlined and discussed above, we hold to be equally without merit.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
No. 120-76

HATZLACHH SUPPLY CO., INC.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed August 2, 1978, for rehearing *en banc* pursuant to Rules 7(d) and 151(b) with reference to the decision entered herein on July 14, 1978, which dismissed plaintiff's petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

[Filed Sep. 29, 1978]

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-530

HATZLACHH SUPPLY CO., INC.,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT
OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 27, 1979.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 6th
day of December, 1978

APPENDIX D

ALLIANCE ASSURANCE COMPANY,
Ltd., Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.
No. 110, Docket 24521.

United States Court of Appeals
Second Circuit.

Argued Dec. 5, 1957.

Decided Feb. 10, 1958.

Insurer and subrogee of owner of imported goods, which mysteriously disappeared from official government warehouse, to which goods had been removed for inspection by customs officials, brought action against the United States under the Tucker Act for breach of implied contract of bailment, and under the Federal Tort Claims Act for negligent loss of the goods. The United States District Court for the Southern District of New York, Richard H. Levet, J., 146 F.Supp. 118, entered judgment for the United States, and the insurer and subrogee appealed. The Court of Appeals, Moore, Circuit Judge, held that there was an "implied contract" on the part of the United States to use due care during term of bailment, within meaning of the Tucker Act, and that there was no "detention" of the goods within the meaning of provision of the Federal Tort Claims Act that the Act does not apply to cases arising under "detention" of goods by customs officials.

Judgment reversed and cause remanded with instructions to enter judgment for the insurer and subrogee.

* * *

James H. Simonson, New York City (Bigham, Englar, Jones & Houston, New York City, on the brief), for plaintiff-appellant, Alliance Assur. Co., Limited.

Foster Bam, Asst. U.S. Atty., Southern District of New York, New York City (Paul W. Williams, U.S. Atty., for Southern District of New York, Benjamin T. Richards, Jr., Asst. U.S. Atty., Southern District of New York, New York City, on the brief), for defendant-appellee, United States of America.

Before CLARK, Chief Judge, MOORE, Circuit Judge, and SMITH, District Judge.

MOORE, Circuit Judge.

This is a suit brought against the United States by Alliance Assurance Company, Ltd., the insurer and subrogee of Carlyle Clothes, Inc., to recover the value of goods, consigned to H. W. Robinson & Co., Inc., customs broker for Carlyle and the importer of record, which, while being inspected for entry into this country, disappeared from the possession of the United States Customs.

Two causes of action were alleged: (1) under the Tucker Act, 28 U.S.C.A. § 1346 (a)(2), for breach of an implied contract of bailment; and (2) under the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), for the negligent loss of the goods.

The Facts

In the cargo discharged from the S.S. Queen Mary at Pier 90, North River, New York, N.Y., in late December 1952 was a case of English woolens weighing 309 pounds imported by the H.W. Robinson & Co., Inc., a licensed customs broker for consignment to Carlyle Clothes. The stipulated value of the goods was $2,460.59. The appropriate entry procedure was followed and $705.25 duty was paid. The Invoice Division at the Custom House

prepared ten so-called "Elliott Fisher" tickets containing identifying information, five of which were forwarded to the Appraiser at Public Stores and five delivered to the importer. Pursuant to statutory requirements (19 U.S.C.A. § 1499), on January 13, 1953 the goods were removed to Public Stores, 201 Varick Street, New York, N.Y. (the official government warehouse), for inspection by the customs officials to ascertain if the goods were of the value and quantity declared in the invoice.

On that date the goods were taken to the fifth floor of Public Stores, an inspection section, where the case was opened by a verifier and checked by an examiner. The goods passed inspection and presumably were repacked by the verifier and transferred to the "passed pile" of goods on that floor. The examiner then prepared a delivery order, consisting of two of the tickets, a white and a red, which were placed in a post office type box reserved for H. W. Robinson & Co., Inc. on the first floor at Public Stores. An employee of the importer then endorsed the white ticket and turned both tickets over to its trucking company which at 4:19 p.m. on the same day, January 13, 1953, surrendered the red ticket to the customs officials to obtain delivery. Since the delivery platform closed at 4:30 p.m., the customs officials would not deliver the goods that day. The red ticket was sent back up to the fifth floor which under prescribed procedure operated as a notice to send the goods down to the delivery platform. The red ticket should have been filed on the fifth floor thus indicating that the goods had been sent to the first floor platform for delivery to the consignee. On the following day, the customs officials were unable to locate the goods to make delivery. On January 21, 1953, a full week after the disappearance, a search throughout Public Stores failed to uncover the goods. Thereafter the duty paid was refunded.

The trial court had no alternative but to find, and in fact did find, that the goods disappeared from the Public Stores

and that "the manner in which they have vanished remains a mystery" (146 F. Supp. 118, 123).

Jurisdiction

The United States made a motion to dismiss both causes of action for lack of jurisdiction over the subject matter. The trial court granted the motion to dismiss the claim under the Tucker Act, but denied the motion in so far as it sought to dismiss the claim under the Federal Tort Claims Act.

The trial court dismissed the cause of action under the Tucker Act "for lack of jurisdiction because it is not based on an express or implied contract within the meaning of the Act." The court, however, held that the government was subject to suit under the Tort Claims Act and that 28 U.S.C.A. § 2680(c) excepting any claim in respect of "the detention of any goods or merchandise by any officer of customs" from that Act did not bar plaintiff's claim because customs could not detain goods which had disappeared. Judgment was entered for the government, the court concluding that "[P]laintiff has failed to prove that the customs officials were negligent in the handling of the case of woolen goods, * * *."

The Cause of Action Under the Tucker Act

The Tucker Act provides in relevant part:

> "(a) the district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> "(s) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The "implied" contracts on which an action may be brought under the Tucker Act are limited to contracts implied in fact as opposed to contracts implied in law, more commonly termed quasi-contracts. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784; United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 46 S.Ct. 501, 70 L.Ed. 911; Merritt v. United States, 267 U.S. 338, 45 S.Ct. 278, 69 L.Ed. 643. The jurisdictional issue depends upon whether the bailment was a contract implied in fact, and if so, the terms of that contract. It, therefore, becomes necessary to analyze what, if any, contractual attributes a bailment of the type here involved possesses.

The obligation of the government was not artificially created by law but rather stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice. Such a promise need not be formalized in a written agreement or even made the subject of a specific conversation. It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed. The elaborate set of ten tickets, at least two of which are designed to restore the goods to the owner, is indicative of this promise.

The government does not contend that the bailment here was "involuntary" in the sense that the goods were thrust upon it. Since it voluntarily undertook a bailment of the goods in question, a promise on its part to use due care during the term of the bailment can and should be implied. In the ordinary bailment "the mutual rights of the parties are often, if not usually, so inadequately fixed by their agreement, that rules of law not based on the agreement, although not inconsistent with it, must be called upon to supply the deficiency." Williston on Contracts, § 1032. It would be the normal and expected ac-

tion on the part of the bailee to promise to use due care, and no judicial inventiveness is required to imply one. It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539. The government's attempt to distinguish the case at bar from the Lynah cases by arguing that some "unforeseeable factor such as theft was present in this case whereas in the 'taking' cases the government was or could have been aware that the plaintiff's injuries would flow directly from its actions" contains its own rebuttal because in this case it can only be held for injuries which were reasonably foreseeable from its breach of its promise to use due care.

Nor does absence of any specific bailment fee weaken the promise or deprive the implied agreement of consideration. This appears to have been the rule for many years. In Wheatley v. Low, Cro. Jac. 668, 79 Eng.Reprint 578 (K.B. 1623), the defendant without compensation accepted money from the plaintiff and promised to deliver it to a certain person. Upon his failure to do so, the defendant suffered an unfavorable verdict in an action of special assumpsit. A motion in arrest of judgment on the ground that there was no consideration was denied "for being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him." In Coggs v. Bernard, 2 Ld.Raym. 909, 92 Eng.Reprint 107 (1703), a gratuitous bailee damaged some casks of brandy which he was transporting and was held liable for his negligent handling. Lord Holt in holding that there was consideration underlying the bailee's gratuitous undertaking said in the course of his opinion (2 Ld.Raym. 919, 92 Eng.Reprint 113):

> "But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."

The doctrine that a gratuitous bailment is supported by consideration has retained its vitality down through modern times. See First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N.Y. 278, 284-285; Glanzer v. Shepard, 233 N.Y. 236, 239-240, 135 N.E. 275, 23 A.L.R. 1425; Siegel v. Spear & Co., 234 N.Y. 479, 483, 138 N.E. 414, 416, 26 A.L.R. 1205. In Siegel v. Spear & Co., supra, Judge Crane, in holding that a gratuitous undertaking was an enforceable contract, observed:

> "In the case of Rutgers v. Lucet, 2 Johns.Cas. 92, 95, the law on this point was stated to be as follows: 'A mere agreement to undertake a trust, *in futuro*, without compensation, it is true, is not obligatory; but when once *undertaken*, and the trust actually *entered upon*, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms.'"

A more compelling reason to find consideration exists here because the bailment, although gratuitous, was compulsory and for the exclusive benefit of the bailee, whereas in the cases above cited the bailment was for the benefit of the bailor.

C.F. Harms Co. v. Erie R. Co., 2 Cir., 1948, 167 F.2d 562, presents a somewhat analogous situation. There the charterer of a barge under orders to deliver a shipment of "half-tracks" to the Army at a pier in Weehawken, N.J., left the

barge with the "half-tracks" aboard at the assigned pier. There was no express contract allowing the government to use the barge or defining the terms and scope of the government's possession and control of the barge. The barge became damaged in a storm and the charterer was allowed to bring an action for liability under the Tucker Act "as a bailee under a contract implied in fact." In his opinion Judge Learned Hand noted that "it [the charterer] had the choice either of refusing to deliver the 'half-tracks' at all, or of trusting to such protection as the Army might give." 167 F.2d 564. Likewise here the bailor had the choice of either electing not to ship the goods into this country or of relying upon such protection as the custom officials chose to give the goods.

The first cause of action was properly brought under the Tucker Act.

The Federal Tort Claims Act

The action is also properly brought under the Federal Tort Claims Act. The government strongly urges that the exception to that Act found in 28 U.S.C.A. § 2680(c) bars such a claim and contends that a "detention" as used therein encompasses not only a refusal to deliver goods admittedly in the possession of customs authorities but a loss of goods formerly in their possession. Here the goods had disappeared and a search of the eight divisions of Public Stores revealed that they were no longer in the possession of the customs authorities. In theory, at least, in order to detain, one must possess something to detain. The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities. An examination of the cases in which the exception was asserted reveals that it is normally used to bar actions based upon the illegal seizure of goods. See,

e.g., Jones v. Federal Bureau of Investigation, D.C., 139 F.Supp. 38, 39; United States v. One 1951 Cadillac Coupe De Ville, D.C., 125 F.Supp. 661. That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail. 28 U.S.C.A. § 2680 (b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others. Nakasheff v. Continental Ins. Co., D.C., 89 F.Supp. 87, reaching a contrary result, was based in large measure on regulations of the Bureau of Customs but such regulations cannot override the clear wording of the statute.

The Burden of Proof

Once the basic fact of loss has been established, there is a presumption of negligence against the bailee. In applying the presumption it is necessary to decide whether the burden of persuasion as well as the burden of coming forward is shifted to the bailee. Since the loss as well as the transaction preceding it occurred in New York, the law of that forum should be applied here.

New York law is well stated in Dalton v. Hamilton Hotel Operating Co., Inc., 242 N.Y. 481, 485, 152 N.E. 268. There the plaintiff stored two trunks in the basement of an apartment hotel while waiting for her apartment to become available. The bailment was gratuitous. When the plaintiff demanded the trunks they could not be found. The defen-

dant, as here, "gave evidence to the effect that it had adopted a system covering the storage of baggage like that which prevailed in other similar buildings and under which articles were to be stored in the room above mentioned where they were under the custody and watch at all times of reliable employees." The court held (242 N.Y. at page 488, 152 N.E. at page 270):

> "When plaintiff demanded that her trunks be delivered to her at her apartment and the defendant failed to do this, a *prima facie* case was established against the latter even of gross negligence which amounted to a breach of its obligations and which called for an explanation. Canfield v. Baltimore & Ohio R. R. Co., 93 N.Y. 532; Hasbrouch v. New York C. & H.R.R.R. Co., 202 N.Y. 363, 373, 374, 95 N.E. 808, 35 L.R.A., N.S., 537. And we do not think that defendant made such explanation as rebutted the presumption and destroyed the *prima facie* case. It attempted to do this by giving evidence of a system under which trunks were placed in a room under the constant watchfulness of competent and reliable employees. As a matter of fact there is no evidence that the plaintiff's trunks ever came within the operation of this system, for they were traced no further than to show that they were taken to the basement of the apartment house. But if we assume that the trunks were placed in the proper depository under the watchfulness provided by the defendant, we do not think that this fact answers the presumption arising in favor of plaintiff on failure to deliver her trunks or satisfactorily explains their disappearance. Presumptively under this system the trunks should have been in defendant's possession and ready for delivery when called for, and it is the failure of what was to be expected that defendant is called on to explain."

This being the New York law, an *a fortiori* situation should exist where the bailment, as here, was compulsory. Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 62 S.Ct. 156, 86 L.Ed. 89, reaffirming by a 5-4 majority a previous decision of an evenly divided court in 313 U.S. 541, 61 S.Ct. 840, 85 L.Ed. 1510, aside from the fact that it did not construe New York law, is distinguishable. There the court was concerned with a voluntary bailment inuring in part to the benefit of the bailor. Here the bailor had no choice of the place of bailment, of the duration of the bailment, or of the bailee. The government took his property for the purpose of assessing the correct amount of duty. For the same reason the test in Fidelity & Guaranty Ins. Corp. v. Ballon, 280 App.Div. 373, 113 N.Y.S.2d 546, is also inapposite.

Where the basic fact — here disappearance of the goods — has strong evidentiary value and where, as here, strong policy reasons exist for requiring an explanation by the party against whom the presumption is applied, the trend has been to shift the burden of persuasion as well as the burden of coming forward. Thus Rule 14 of the Uniform Rules of Evidence, approved in 1953 by the American Bar Association, dealing with the effect of presumptions, provides that "if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates."

In arguing that presumptions in general should have the effect of shifting the burden of persuasion, Morgan in his article, Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, singles out the bailment situation for particular emphasis. He observes (pp. 79-80):

> "Some presumptions the courts have created because the evidence which will establish the fact is peculiary accessible to one of the parties. Thus, where a chattel in good condition is entrusted to a bailee for hire and he delivers it in bad condition to his bailor, the damage is presumed to have been caused by the bailee's negligence. 'The goods are entrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss.' Is it reasonable to permit the presumption to be destroyed by the mere production of testimony which would justify a trier in finding due care but which in fact has no tendency to persuade the particular trier that such care has been used? It is true that in judicial discussions of rules of evidence and procedure the dangers of perjury and the supposed efficacy of legal rules to prevent it are greatly overemphasized. Still, is it not true that a doctrine which allows a party to escape liability by merely producing evidence regardless of its actual convincing power is a real incentive to perjury?"

The bailee should bear the burden of persuasion. Gardner v. Jonathan Club, 35 Cal.2d 343, 217 P.2d 961; Redfoot v. J.T. Jenkins Co., 138 Cal.App.2d 108, 291 P.2d 134; Downey v. Martin Aircraft Service, 96 Cal.App.2d 94, 214 P.2d 581; Jacques v. City Parking Service, La.App., 97 So.2d 78; Buckey v. Indianhead Truck Line, 234 Minn. 379, 48 N.W.2d 534. The government in this case is in a position of public trust at least equal to that of common carriers which uniformly must discharge both burdens. Uniform Bills of Lading Act § 12; 49 U.S.C.A. § 88. The goods here were in the exclusive custody and control of the defendant; the circumstances under which the goods were handled were within only its knowledge. Upon it should rest

the burden of establishing by a preponderance of the evidence that the loss was probably caused by some event beyond its control such as an unpreventable fire, theft or other circumstance more consistent with due care rather than negligence.

Accepting the finding made by the trial court that the loss was unexplained, the government failed to discharge its burden of showing that it was not negligent. With the exception of the examiner, the defendant called none of the employees charged with the duty of actually processing the goods in the Public Stores. There was no testimony from the verifier on the fifth floor whose responsibility it was to repack the case and place it in the "passed pile," none from the guard who was charged with caring for the "passed pile," none from the officer who should have received the red ticket and thereupon taken the goods from the "passed pile" onto the elevator, none from the elevator operator who would have taken the goods down to the first floor, and none from the guards and officers on the delivery platform. Nor was the red ticket which should have been filed on the fifth floor prior to the goods being sent down to the first floor introduced in evidence.

The government did no more than establish general prudent procedure analogous to offering evidence of careful manufacturing processes to show that a particular piece of merchandise could not have been defective or to prove a regular business routine to establish that a letter was mailed; but this was not the issue. There was no question that the goods were not delivered. Proof of a course of business was not sufficient to rebut the presumption against the government. Murphy v. Co-op Laundry Co., 230 Minn. 213, 41 N.W.2d 261; Dalton v. Hamilton Hotel Operating Co., Inc., supra. The government did no more than attempt to establish what already was conceded before the trial, namely, to use the language of the trial court, "that the cause of loss was a mystery." The government

cannot avoid liability for the loss by showing that it does not usually lose the goods it handles under routine procedures.

The judgment is reversed and remanded with instructions to enter judgment for the plaintiff.
